SEP 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend EDWARD BOCHNER; JEANY LERNER, by her next friend LEA LERNER; IRA DALY, by his next friend BERNARD DALY; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

against

COMMUNITY SCHOOL BOARD NO. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Supreme Court.

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In The

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Presidents Council, District 25; Jeffrey Bochner, by his next friend Edward Bochner; Jeany Lerner, by her next friend Lea Lerner; Ira Daly, by his next friend Bernard Daly; Mary Finnegan; Morris Reich; Myrna Sutz; Josephine Pizer; Walter Michael; Carola Michael; Lea Lerner; Bernard Daly; Ruth Daly; Merill Youkeles; Evelyn Sussman,

Petitioners,

against

Community School Board No. 25; Cormac K. Meagher, individually and as Community Superintendent of Community School District No. 25,

Respondents.

Appeal from the United States District Court for the Eastern District of New York.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Supreme Court.

This brief is submitted on behalf of the defendant Antoinette McCarthy, individually and as representative of the Committee for Parent's Rights in Public Education. Mrs. McCarthy was not an original defendant but moved to intervene subsequent to the filing of the com-

plaint. The motion was granted by the District Court. The Committee for Parent's Rights in Public Education submitted over 700 parents' signatures to a petition opposing the return of the book Down These Mean Streets to the open shelves of the Junior High School Libraries in Public School District No. 25.

Facts.

The following facts were either conceded or uncontested in the District Court:

1. The Board is the duly and legally elected Community School Board of Community School District No. 25.

2. The power of the state to determine matters relating to the education of students, including the prescription of a curriculum and the selection of textbooks and other instructional material, has been delegated by the New York State Legislature to the duly elected Community School Boards in New York City (New York Education Law, Section 2590-E).

3. Pursuant to resolution duly adopted by the Board, the book *Down These Mean Streets* by Piri Thomas was removed from the school libraries from Junior High Schools No. 185, 189 and 218 pursuant to the resolution adopted by the Board on April 19, 1971.

4. The students at Junior High Schools No. 185, 189 and 218 range in age from eleven (11) to fifteen (15) years.

5. The State of New York has provided administrative procedures for the review of arbitrary actions on the part of Community School Boards and final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules (A-224-225).

6. Those schools which previously had the book in their respective libraries, were directed by the School Board to implement a procedure to loan said book directly to the parents of the children attending those schools who request the book (A-113).

Reasons for Denying the Writ.

Contained in petitioner's brief (pp. 4 through 7) under the heading "*Reasons for Granting The Writ*" is an analysis of the purported constitutional issues that the petitioner claims is involved in the case at bar, and which said issues the petitioner claims are important that this court review.

The petitioner has stated that "* * * local pressure groups succeed in persuading School Boards to purge controversial books, * * *" and that the issue to be decided by the court is "* * * to what extent are school professionals at the mercy of politically responsive, often elected, lay boards of education in determining what their students may read and learn in the schools." Petitioners further urge that the court below "* * * indicated that libraries are not an area in which constitutional freedoms need receive 'vigilant protection'," and that "* * * the courts below would apparently not interfere with School Boards which systematically purge the library of all books advocating peace or integration, or their curricula of all courses treating the United Nations." The petitioner further urges that the Federal Judiciary not "* * * indulge such direct political intrusion into the materials that teachers will be permitted to assign." And that the plaintiffs are turning to the Federal Courts because "* * * their libraries and their curricula are stripped of books which happen to be in political disfavor with a shifting majority of the School Board * * *"

These extraordinary distortions of the issues presented in the case at bar constitute an outrageous imposition upon this court. There is not one shred of evidence in the record that "local pressure groups succeeded in persuading School Boards to purge controversial books" nor is there one shred of evidence in the record that there was any "political intrusion into the materials that teachers will be permitted to assign."

As stated by Circuit Judge Mulligan, writing for the United States Court of Appeals Second Circuit of New York (p. 7A of the Appendix):

> "The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing "Down These Mean Streets" in class or for assigning it for outside reading. In those libraries which have the book, the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it" (p. 9A of Appendix).
>
> "There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarian. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book."

The defendant Board has rightfully determined that the book Down These Mean Streets is not a fit and proper educational tool to remain on the open shelves of a Junior High School library available for 11 to 15-year-olds. Judge Mulligan described this book as follows:

Page 4A of Appendix:

> "The book, which has created the controversy and provoked the action of the Board, Down These Mean Streets, is an autobiographical account by Pirie Thomas, of a Puerto Rican youth growing up in the East Side Barrio (Spanish Harlem) in New York City. Predicably, the scene is depressing, ugly and violent. The argot of the vicinage is replete with four-letter and 12-letter obscenities unreported by Tom Swift or even Tom Jones. Acts of criminal violence, sex, normal and pervert as well as episodes of drug shooting are graphically described."

The decision of the duly constituted School Board acting under its lawful authority (there is no claim that the law under which the School Board derived its authority is in any way unconstitutional) determined in their wisdom and discretion that the aforesaid book was not a proper vessel and means for educating the students. In no way, shape or form did the action of the School Board in any way prevent, stop or terminate the teaching of any ideas or subjects in these Junior High Schools. In fact, the record showed that, in the social studies courses, problems of the ghetto are taught and discussed and, in addition, the schools have sex education courses.

The petitioner argues that the United States Court of Appeals "matter of factly" answered that someone has to make a determination as to what the library collection will be and that the court below further suggests that "*any* determination" which the Board makes is beyond "judicial review" (p. 8, petitioner's brief). The petitioner further states that the Court of Appeals "conveniently ignored * * * the fact that the book itself cannot be read."

Here, again, the petitioner levels uncalled for and unfair strictures upon the learned and scholarly judge who wrote the unanimous decision of the United States Court of Appeals. These liberties are very frankly further impositions on this court.

There was nothing "matter of fact" about the scholarly decision of Judge Mulligan nor that of Judge Mishler, the Presiding Judge of the United States Court, Eastern District of New York. The Court of Appeals never suggested that "any determination which the Board makes regarding its library collection is beyond judicial review." Nor did the Court of Appeals "conveniently ignore" anything. Conveniently ignored by the petitioner is the fact that this book is available to the parent of any student in Junior High School who wishes to borrow the book and said parent is then free to allow his child to read the book if the parent so wishes. Conveniently ignored by the petitioner is the fact that the facts of the case at bar present no intrusion upon the subject matters which students in these schools may be exposed to and learn. Conveniently ignored by the petitioner is the fact that the crux of the dispute is a disagreement as to whether this book is a suitable educational tool for use on the open shelves of a Junior High library.

A decision has been made by a majority of the duly elected local School Board based solely upon their belief as to what is best educationally and psychologically for the 11 to 15-year-old under their jurisdiction. If this decision were arbitrary or capricious, the plaintiffs have available adequate administrative remedies under the laws of the State of New York. The claim that this book was removed from the school library because it was "in political disfavor" with a shifting majority of the School Board is an outrageous fiction. On the contrary, the plaintiffs are attempting to use the Federal Court as a

means of imposing their educational values and judgments upon the majority of the parents of the students in Junior High School who are represented by the majority of the School Board.

As stated by Judge Mulligan (p. 6A, Appendix):

> **"Our function is purely one of constitutional adjudication on the facts and the record before us: Has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children."**

The decision by Judge Mishler in the District Court and by Judge Mulligan speaking on behalf of the unanimous Court of Appeals clearly demonstrate that there has been no constitutional abridgment of any first amendment rights of the plaintiffs.

Conclusion.

The application for a writ of certiorari submitted by the petitioner should be denied.

Respectfully submitted,

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